

IN THE WATER COURT OF THE STATE OF MONTANA
UPPER MISSOURI DIVISION
DEARBORN RIVER BASIN (41U)
PRELIMINARY DECREE

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CLAIMANTS: Charles F. Melaney; Susan M. Melaney

OBJECTORS: Charles F. Melaney; Susan M. Melaney

NOTICE OF INTENT TO APPEAR: Dearborn Ranch LLC

CASE 41U-0069-R-2023

41U 100069-00

41U 100070-00

NOTICE OF FILING OF MASTER'S REPORT

This Master's Report was filed with the Montana Water Court on the above-stamped date. Please review this report carefully.

You may file a written objection to this Master's Report within **10 days** of the stamped date if you disagree or find errors with the Master's findings of fact, conclusions of law, or recommendations. Rule 23, W.R.Adj.R. If the Master's Report was mailed to you, the Montana Rules of Civil Procedure allow an additional 3 days be added to the 10-day objection period. Rule 6(d), M.R.Civ.P. If you file an objection, you must serve a copy of the objection to all parties on the service list found at the end of the Master's Report. The original objection and a certificate of mailing to all parties on the service list must be filed with the Water Court.

If you do not file a timely objection, the Water Court will conclude that you agree with the content of this Master's Report.

MASTER'S REPORT

FINDINGS OF FACT

1. Charles F. Melaney and Susan M. Melaney are the record owners of claims 41U 100069-00 and 41U 100070-00

2. Claim 41U 100069-00 was decreed with an issue remark:

POINT OF DIVERSION AND DITCH NAME WERE MODIFIED AS A RESULT OF DNRC REVIEW UNDER MONTANA WATER COURT REEXAMINATION ORDERS. IF NO OBJECTIONS ARE FILED TO THIS CLAIM, THESE ELEMENTS WILL REMAIN AS THEY APPEAR ON THIS ABSTRACT AND THE REMARK WILL BE REMOVED FROM THE CLAIM.

3. Charles F. Melaney and Susan M. Melaney objected to claims 41U 100069-00 and 41U 100070-00 based on flow rate/volume (both claims), point of diversion/means of diversion (both claims), and place of use/maximum acres (claim 41U 100070-00). The Affidavit of Susan M. Melaney, aerial photographs, and maps were attached to the Objections.

4. Dearborn Ranch, LLC filed a Notice of Intent to Appear for claim 41U 100069-00.

5. The parties were ordered to file settlement documents by April 28, 2023. The Order Setting Filing Deadline indicated that if nothing were filed by April 28, 2023, this Water Master would conclude the parties were unable to resolve the Notice of Intent to Appear concerns, and a hearing track order would be issued.

6. On April 27, 2023 Dearborn Ranch, LLC withdrew its Notice of Intent to Appear for claim 41U 100069-00 conditioned on the flow rate not exceeding 7.50 cfs, and a point of diversion being added in the SENENE of Section 30, Township 17 North, Range 5 West, consistent with the Objection.

7. On April 27, 2023, Mark Salmond, son-in-law of Charles F. Melaney and Susan M. Melaney filed the following statement:

Dear Water Court,

Montana Water Court

We have spoken with the representatives of NOIA party, Dearborn Ranch, LLC. It is our understanding they will be withdrawing their NOIA. In the near future, Charles and Susan Melaney will submit a motion to amend to 41U [100069-00](#) and 41U [100070-00](#) reflecting the same corrections as identified in their self-objections submitted on May 18, 2022. We hope the motion, along with the NOIA withdrawal, will resolve the case. Thank you.

Sincerely,

Mark Salmond, son-in-law of Charles and Susan Melaney

The motion to amend referenced in Mark Salmond's April 27, 2023 filing was never filed.

8. Claim 41U 100069-00 was claimed with a 300.00 miner's inches (7.50 cubic feet per second (cfs)) flow rate. The flow rate was reduced to the 17.00 gallon per minute (gpm) standard during DNRC examination of the claim. The Objection to claim 41U 100069-00 explains:

The 1904 Notice of Appropriation, found in the claim file, states the 300 Miner's Inches of water from the Middle Fork of the Dearborn River was appropriated on June 1, 1886. Since before 1973, Susan Melaney has diverted water from the Middle Fork of the Dearborn River at a rate of 300 Miner's Inches (7.50 cfs). See paragraph 12 of Susan Melaney's Affidavit provided as Appendix A. The Montana Department of Natural Resources and Conservation (DNRC) erroneously reduced the flow rate to 1.71 cfs based on a standard of 17 GPM per acre¹. The flow rate should be corrected to the originally claimed, and historically/currently used 300 Miner's Inches, or 7.50 cfs, for claim 41U 100069 00.

Susan M. Melaney's Affidavit supports the use of 300.00 miner's inches from the Middle Fork of the Dearborn River.

9. Claim 41U 100070-00 was claimed with a 300.00 miner's inches (7.50 cfs) flow rate. Like claim 41U 100069-00, the flow rate was reduced to the 17.00 gpm standard during DNRC examination of the claim. The Objection to claim 41U 100070-00 explains:

The 1888 Notice of Water Right, found in the claim file, also states that 300 Miner's Inches of water from Auchard Creek was appropriated on August 17, 1888. Since before 1973, Susan Melaney has diverted water from the Auchard Creek at a rate of 300 Miner's Inches (7.50 cfs). See paragraph 12 of Susan Melaney's Affidavit provided as Appendix A. The Montana Department of Natural Resources and Conservation (DNRC) erroneously reduced the flow rate to 1.90 cfs based on a standard of 17 GPM per acre¹. The flow rate should be corrected back to the originally claimed, and historically/currently used 300 Miner's Inches, or 7.50 cfs, for claim 41U 100070 00.

Susan M. Melaney's Affidavit supports the use of 300.00 miner's inches from Auchard Creek.

10. Claim 41U 100069-00 was claimed and decreed with a single point of diversion, a ditch (means of diversion a headgate), in the NWSWSW of Section 20, Township 17 North, Range 5 West, Lewis and Clark County. The Objection to claim 41U 100069-00 explains:

An additional point of diversion needs to be added to claim 41U 100069 00 to properly reflect historic use. The claimant inadvertently omitted a second point of diversion in the SENENE Section 30 Township 17 North Range 5 West. See map provided as Exhibit B of Susan Melaney's affidavit provided as Appendix A. Based on the Water Resources Survey Township 17 North Range 5 West map, provided as Appendix B, and historic aerial imagery, maps provided as Appendix C, there is an additional point of diversion that diverts from the Middle Fork of the Dearborn River in SENENE Section 30 Township 17 North Range 5 West. Susan Melaney states that she has diverted from both points of diversion since before 1973. See paragraph 7 of Susan Melaney's affidavit provided as Appendix A. The additional point of diversion located in SENENE Section 30 Township 17 North Range 5 West should be added to 41U 100069 00.

Susan M. Melaney's Affidavit supports the use of the additional point of diversion. The 1953 aerial photograph attached to the Objection for claim 41U 100069-00 shows the additional point of diversion in the SENENE of Section 30, Township 17 North, Range 5 West, Lewis and Clark County.

11. Claim 41U 100070-00 was claimed and decreed with a single point of diversion, a ditch (means of diversion a headgate), in the SWNWSE of Section 1, Township 17 North, Range 5 West, Lewis and Clark County. The Objection to claim 41U 100070-00 explains:

An additional point of diversion needs to be added to claim 41U 100070 00 to properly reflect historic use. 41U 100070 00 was originally claimed with one point of diversion, a headgate in SWNWSE Section 1 Township 17 North Range 5 West from Auchard Creek. The claimants inadvertently omitted a second point of diversion from Auchard Creek in SENWNE Section 13 Township 17 North Range 5 West, shown on the map provided as Exhibit D of Susan Melaney's affidavit provided as Appendix A. The Water Resources Survey map for Township 17 North Range 4 West shows that there are traces of a ditch found in Section 18 Township 17 North Range 4 West. See Water Resources Survey map provided as Appendix B. The trace of a ditch north of Auchard Creek is depicted as diverting from the creek in Section 18 Township 17 North Range 4 West, but based on the historic and current aerial imagery, see maps provided as Appendix C, the diversion of this ditch is located in SENWNE Section 13 Township 17 North Range 5 West. Susan Melaney states that she has diverted from both points of diversion since before 1973. See paragraph 10 and map provided as Exhibit D of Susan Melaney's Affidavit provided as Appendix A. The additional point of diversion located in SENWNE Section 13 Township 17 North Range 5 should be added to 41U 100070 00.

Susan M. Melaney's Affidavit supports the use of the additional point of diversion. The 1953 aerial photograph attached to the Objection for claim 41U 100070-00 shows the additional point of diversion in the SENWNE of Section 13, Township 17 North, Range 5 West, Lewis and Clark County.

12. Claim 41U 100070-00 was claimed and decreed with a 50.00 acre place of use:

Place of Use:

<u>ID</u>	<u>Acres</u>	<u>Govt Lot</u>	<u>Qtr Sec</u>	<u>Sec</u>	<u>Twp</u>	<u>Rge</u>	<u>County</u>
1	50.00		E2	12	17N	5W	LEWIS AND CLARK
Total:		50.00					

The Objection to claim 41U 100070-00 explains:

Additional place of use and maximum acres need to be added to claim 41U 100070 00 to properly reflect historic use. This claim was originally claimed with 50 acres of irrigation in E2 Section 12 of Township 17 North Range 5 West. The claimants inadvertently omitted the irrigated acres in Section 13 of Township 17 North Range 5 West and Section 18 of Township 17 North Range 4 West. Based on historic and current imagery, provided as Appendix C, there are an additional 33.9 acres in NE Section 13 of Township 17 North Range 5 West, 1.3 acre in N2N2NESE Section 13 of Township 17 North Range 5 West, 2.1 acres in SWSWNW Section 18 of Township 17 North Range 4 West, and 96.8 acres in S2 Section 18 of Township 17 North Range 4 West. Since before 1973, Susan Melaney has irrigated the areas shown as yellow hash marks on the map provided as Exhibit D of Susan Melaney's Affidavit provided as Appendix A. 41U 100070 00 place of use and acres should include the additional acres in the legal land descriptions listed on Table 1 on the next page.

Susan M. Melaney's Affidavit supports the additional places of use being added to claim 41U 100070-00. The 1953 aerial photograph attached to the Objection for claim 41U 100070-00 shows the additional places of use as irrigated.

CONCLUSIONS OF LAW

1. The Water Court is required to address all issue remarks that appear on a claim as well as any objections the claim receives. Sections 85-2-233, 85-2-247, and 85-2-248, MCA.
2. A properly filed Statement of Claim for an existing water right is prima facie proof of its content. Section 85-2-227, MCA. This prima facie validity may be overcome by evidence showing that one or more elements of the claim are incorrect. This standard of proof applies to objectors or claimants objecting to their own water right claims. Rule 19, W.R.Adj.R., *Nelson v. Brooks*, 2014 MT 120; 375 Mont.86, 95; 329 P.3d 558, 564.

RECOMMENDATIONS

1. The flow rate for claim 41U 100069-00 should be increased from 1.71 cfs to 7.50 cfs. A second point of diversion should be added to claim 41U 100069-00, as follows:

Qtr Sec	Sec	Twp	Rge	County
SENE	30	17N	5W	LEWIS AND CLARK
Period of Diversion: APRIL 1 TO NOVEMBER 1				
Diversion Means: HEADGATE				
Ditch Name: BORHO DITCH				

The issue remark should be removed from claim 41U 100069-00, it has served its notice purpose.

2. The flow rate for claim 41U 100070-00 should be increased from 1.71 cfs to 7.50 cfs. A second point of diversion should be added to claim 41U 100070-00, as follows:

Qtr Sec	Sec	Twp	Rge	County
SEWNE	13	17N	5W	LEWIS AND CLARK
Period of Diversion: APRIL 1 TO NOVEMBER 1				
Diversion Means: HEADGATE				

The maximum acres and place of use for claim 41U 100070-00 should be modified, as follows:

Maximum Acres:		50.00	184.10				
Place of Use:							
ID	Acres	Govt Lot	Qtr Sec	Sec	Twp	Rge	County
1	50.00		E2	12	17N	5W	LEWIS AND CLARK
2	33.90		NE	13	17N	5W	LEWIS AND CLARK
3	1.30		N2N2NESE	13	17N	5W	LEWIS AND CLARK
R	4	2.10	SWSWNW	18	17N	4W	LEWIS AND CLARK
	5	96.80	S2	18	17N	4W	LEWIS AND CLARK

3. The Objections to claims 41U 100069-00 and 41U 100070-00 should be dismissed because the changes requested in the Objections have been recommended for both claims.

Post Decree Abstracts of Water Right Claims are served with the Report for review.

ELECTRONICALLY SIGNED AND DATED BELOW.

Service Via Electronic Mail:

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Susan M. Melaney
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**POST DECREE
ABSTRACT OF WATER RIGHT CLAIM
DEARBORN RIVER
BASIN 41U**

Water Right Number: 41U 100069-00 STATEMENT OF CLAIM

Version: 3 -- POST DECREE

Status: ACTIVE

Owners: CHARLES F MELANEY
6615 MT HIGHWAY 434
WOLF CREEK, MT 59648 8635

SUSAN M MELANEY
6615 MT HIGHWAY 434
WOLF CREEK, MT 59648 8635

Priority Date: JUNE 1, 1886

Type of Historical Right: FILED

Purpose (use): IRRIGATION

Irrigation Type: FLOOD

Flow Rate: 7.50 CFS

Volume: THE TOTAL VOLUME OF THIS WATER RIGHT SHALL NOT EXCEED THE AMOUNT PUT TO HISTORICAL AND BENEFICIAL USE.

Climatic Area: 4 - MODERATELY LOW

Maximum Acres: 45.00

Source Name: MIDDLE FORK DEARBORN RIVER

Source Type: SURFACE WATER

Point of Diversion and Means of Diversion:

<u>ID</u>	<u>Govt Lot</u>	<u>Qtr Sec</u>	<u>Sec</u>	<u>Twp</u>	<u>Rge</u>	<u>County</u>
1		NESESE	19	17N	5W	LEWIS AND CLARK

Period of Diversion: APRIL 1 TO NOVEMBER 1

Diversion Means: HEADGATE

Ditch Name: BORHO DITCH

2		SENESE	30	17N	5W	LEWIS AND CLARK
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Period of Diversion: APRIL 1 TO NOVEMBER 1

Diversion Means: HEADGATE

Ditch Name: BORHO DITCH

Period of Use: APRIL 1 TO NOVEMBER 1

Place of Use:

<u>ID</u>	<u>Acres</u>	<u>Govt Lot</u>	<u>Qtr Sec</u>	<u>Sec</u>	<u>Twp</u>	<u>Rge</u>	<u>County</u>
1	23.00		SENESE	20	17N	5W	LEWIS AND CLARK
2	12.00		SW	20	17N	5W	LEWIS AND CLARK
3	10.00		E2NE	20	17N	5W	LEWIS AND CLARK

Total: 45.00

**POST DECREE
ABSTRACT OF WATER RIGHT CLAIM
DEARBORN RIVER
BASIN 41U**

Water Right Number: 41U 100070-00 STATEMENT OF CLAIM

Version: 3 -- POST DECREE

Status: ACTIVE

Owners: CHARLES F MELANEY
6615 MT HIGHWAY 434
WOLF CREEK, MT 59648 8635

SUSAN M MELANEY
6615 MT HIGHWAY 434
WOLF CREEK, MT 59648 8635

Priority Date: AUGUST 17, 1888

Type of Historical Right: FILED

Purpose (use): IRRIGATION

Irrigation Type: FLOOD

Flow Rate: 7.50 CFS

Volume: THE TOTAL VOLUME OF THIS WATER RIGHT SHALL NOT EXCEED THE AMOUNT PUT TO HISTORICAL AND BENEFICIAL USE.

Climatic Area: 3 - MODERATE

Maximum Acres: 184.10

Source Name: AUCHARD CREEK

Source Type: SURFACE WATER

Point of Diversion and Means of Diversion:

<u>ID</u>	<u>Govt Lot</u>	<u>Qtr Sec</u>	<u>Sec</u>	<u>Twp</u>	<u>Rge</u>	<u>County</u>
1		SWNWSE	1	17N	5W	LEWIS AND CLARK

Period of Diversion: APRIL 1 TO NOVEMBER 1

Diversion Means: HEADGATE

2		SEWNNE	13	17N	5W	LEWIS AND CLARK
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Period of Diversion: APRIL 1 TO NOVEMBER 1

Diversion Means: HEADGATE

Period of Use: APRIL 1 TO NOVEMBER 1

Place of Use:

<u>ID</u>	<u>Acres</u>	<u>Govt Lot</u>	<u>Qtr Sec</u>	<u>Sec</u>	<u>Twp</u>	<u>Rge</u>	<u>County</u>
1	50.00		E2	12	17N	5W	LEWIS AND CLARK
2	33.90		NE	13	17N	5W	LEWIS AND CLARK
3	1.30		N2N2NESE	13	17N	5W	LEWIS AND CLARK
4	2.10		SWSWNW	18	17N	4W	LEWIS AND CLARK
5	96.80		S2	18	17N	4W	LEWIS AND CLARK

Total: 184.10

Remarks:

THE WATER RIGHTS LISTED FOLLOWING THIS STATEMENT ARE MULTIPLE USES OF THE SAME RIGHT. THE USE OF THIS RIGHT FOR SEVERAL PURPOSES DOES NOT INCREASE THE EXTENT OF THE WATER RIGHT. RATHER IT DECREES THE RIGHT TO ALTERNATE AND EXCHANGE THE USE (PURPOSE) OF THE WATER IN ACCORD WITH HISTORICAL PRACTICES.

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